IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL NO. 140 OF 1993

For Approval and Signature:

The Hon'ble MR. JUSTICE S.D. DAVE
AND
The Hon'ble MR. JUSTICE H.R. SHELAT

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1. Whehter Reporters of Local Papers may be allowed to see the judgment? No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgment? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

Appearance:

Mr. K.B. Anandjiwala for appellant
Mr. S.T. Mehta for Respondent

CORAM: S.D. DAVE & H.R. SHELAT, JJ
Date of Decision: 26th July, 1996

ORAL JUDGMENT: (Per Shelat, J.)

1. The appellant through this Appeal challenges the judgment dated 8th December, 1992, delivered by the then learned Additional Sessions Judge at Bhavnagar in Session Case No. 172 of 1991, convicting him under Sections 302 & 324 of the Indian Penal Code, 135 of the Bombay Police Act and Section 66(1)(B) & Section 85(1)(3) of the Bombay Prohibition Act, and sentencing him to rigorous imprisonment of the offence under Section 302 IPC but

inflicting no separate sentence qua the other charges. The case of the prosecution may be summarised as under :

2. Damjibhai Madhavbhai residing at Jambala had gone to Thana for polishing diamond. He returned in the evening. At 8..00 p.m. he was going to his house riding over his cycle. When he reached near the bus station of Jambala, he found that Ganeshbhai Hirabhai, the appellant, and Manjibhai Baberbhai were abusing. There certain women and girls were present. As the females were present, Damjibhai advised these three persons not to abuse in the public place. Ganeshbhai Hirabhai lost his temper and gave a slap to Damjibhai, while the present appellant who was also enraged, gave a knife blow and caused injury on the abdomen of Damjibhai. Damjibhai went to his house and informed his father Madhabhai. His father questioned where the appellant and his crony would be. Damjibhai informed that they would be either near the bus stand or on the road. Madhabhai and few others then went to the S.T. bus stop for the purpose of reprimanding the appellant and his crony. When they reached the S.T. Bus stop, the appellant came out from the bush and questioned what the matter was? After being questioned by Madhabhai Jadvbhai as to why he had caused injury to his son, the appellant immediately brought out the knife from his waist and gave a blow as a result, Madhabhai Jadav sustained injury on the right side of the chest. Harjibhai was with him. He tried to rescue. He also sustained injury. Rameshbhai Popatbhai Astik was also present there. He caught hold of the appellant and took him towards the house of Kantibhai. Madhabhai Jadav, who was injured seriously was taken to the Government Hospital at Sihor by a tempo. The doctor on duty in the hospital on examination declared Madhabhai Jadav dead. Dahyabhai Jethabhai who had accompanied the deceased went to Police Station and informed about the incident. Hirabhai who sustained the injury also went to the doctor, took the preliminary treatment, and then went to Bhavnagar for treatment where he was hospitalised for few days. After the receipt of the complaint, the Police Officer of Sihor Police Station, initiated the investigation. At the conclusion of the investigation, he filed the charge sheet before the Court of Judicial Magistrate, (First Class) at Sihor. The Magistrate was not competent to hear and decide the case. He, therefore, committed the case to the court of Sessions at, Bhavnagar. The case then came to be registered as Session Case No. 172 of 1991. The learned Additional Session Judge, Bhavnagar, who at the conclusion of the hearing found that the prosecution had qua the appellant succeeded in establishing the charge of the offences

under Sections 302, 324 of the I.P.C., 135 of the Bombay Police Act and Section 66(1)(B) and Section 85(1)(3) of the Bombay Prohibition Act, held the appellant guilty and sentenced him to rigorous imprisonment for life, but acquitted Ganeshbhai Hirabhai the accused No.2. The present appeal is therefore filed by the convict appellant.

3. At the time of hearing Mr. Anandjiwala representing the appellant took us to the entire evidence on record, but he advanced his submission mainly on two grounds, namely, non-explanation of the injury on the person of the appellant and self-defence. We would, therefore, confine to the two points raised before us. Mr. S.T. Mehta, the learned A.P.P. supported the judgment and order of the lower court submitting that there was no reason to interfere with the findings of the learned Sessions Judge even on the two grounds raised on behalf of the appellant.

4. Before we proceed to dissect the merits of the contentions raised, we think it proper to mention about the authorities referred to by the learned advocates. Firstly, the decision of the Apex Court in the case of LAKSHMI SINGH v. STATE OF BIHAR, in AIR 1976 SC 2263 was pointed out, wherein it is laid down that following three inferences would arise if the prosecution does not explain the injury on the accused which is sustained during the incident alleged by the prosecution:

(i) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

(ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(iii) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

It is also made clear that this principle would not obviously apply to the case where injuries sustained by the accused are minor and superficial; or where the evidence is so clear and cogent so independent and

disinterested, so probable, consistent and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries. When a point about non-explanation of the injury on the person of the accused was again raised before the Apex Court in the case of HARE KRISHNA SINGH v. STATE OF BIHAR, AIR 1988 SC 863, it is observed that the obligation of the prosecution to explain the injury sustained by the accused in the same occurrence may not arise in each and every case. If the witness is examined on behalf of the prosecution are believed by the court in proof of the guilt of the accused beyond reasonable doubt, the question of the obligation of the prosecution to explain the injuries sustained by the accused will not arise. It is also made clear that when the prosecution comes with a definite case that the offence has been committed by the accused and proves its case beyond any reasonable doubt, it becomes hardly necessary for the prosecution to again explain how and in what circumstances injuries have been inflicted on the person of the accused.

5. In another case of MUKUNDE SINGH v. STATE OF U.P.(1994) 2 SCC 191 when the question was again raised, it is held that failure to explain injuries on accused would not compel the court to reject the evidence of the prosecution witnesses. The case has, from the materials on record and in the context the omission on the part of the prosecution, is required to be judged. If the plea of self-defence is raised, the court has to appreciate the evidence on that point and should also find out whether the right of self defence has been exceeded or not. Thus, the combined study of all the three decisions reveals that the prosecution is no doubt bound to explain the visible injuries on the person of the accused if he has sustained injuries during that occurrence, but always non-explanation of the injuries would not be fatal to the case of the prosecution, provided the evidence led by the prosecution is cogent, probable, convincing, credible, clear, independent, disinterested, consistent and leaves no room to doubt. If that is so and by such evidence, the charge is clearly established by the prosecution, the omission on the part of the prosecution would not have the damaging effect. In view of such law made clear by the Apex Court, if evidence is weighed and appreciated, we must say that the omission to explain the injury is certainly fatal to the prosecution.

6. Damjibhai Madhabhai (Exhibit 15) has come forth with the say that the appellant caused him injury by giving knife blow. He was sent to the medical officer for treatment. Doctor Dineshbhai Raghavbhai Makwana

(Exhibit 11) examined him. He found only the abrasion on the abdomen and no injury which can be caused by sharp cutting instrument namely knife. He has clearly opined that the abrasion he found was possible by hard and blunt substance. On the basis of the doctor's evidence and what Damjibhai has alleged, we are inclined to agree with the learned advocate representing the appellant that Damjibhai has made material improvements in his statement and also in his evidence before the court. The evidence of such witness cannot be accepted without any independent corroboration, as his evidence cannot be termed free from doubt and credible. Harjibhai Jadavbhai, the brother of the deceased had accompanied the deceased for the purpose of rebuking the appellant. He has been examined at Exhibit 16. He has also improved his story. According to him, when he tried to rescue his brother Madhabhai Jadavbhai, the appellant caused injury by giving a knife blow on his thigh, but Dr. Nitin Himmatlal (Exhibit 9) has not supported the prosecution, opining that he simply found a swelling on the left thigh which was possible by hard and blunt substance. It was not possible for Doctor Maniyar to opine positively as to by what instrument the same could have been caused. But in the certificate he has opined that it could have been caused by hard and blunt instrument. Harjibhai Jadavbhai is thus making alarming improvement so as to misguide and misdirect the concerned authorities, and that reveals a guilty conscious of suppressing the true facts. There is another circumstances which emerges from his evidence indicating that his versions are not at all credible. Though he sustained minor injury, taking preliminary treatment, he goes to Bhavnagar and stays in the hospital as indoor patient about 4 to 5 days. Dr. Nitinbhai (Exhibit 9) has categorically opined that looking to the only injury sustained by Harjibhai, there was no justifiable reason to keep him as indoor patient. Still, however, Harjibhai goes to Bhavnagar and manages for his being admitted as indoor patient for about 4 to 5 days, and that shows that in order to screen himself from the liability that was likely to follow because of the assault on the accused, as submitted by the learned advocate Mr. Anandjiwala, he managed for his hospitalisation. Though his brother was murdered and on the next day there was a funeral procession he did not attend the same on the ground of his being hospitalised, and that circumstance also casts doubt on his testimony. In fact it was possible for him to attend the funeral procession looking to the said injury. His abstinance from attending funeral also shows that here is the witness who is made to support a case got up for the purpose of escaping of the liability that might arise,

because of the particular stand taken by the accused right from the initial moment, which we will be referring to herein below detail at the appropriate stage:

7. Dahyabhai Jethabhai (Exhibit 14) has also no doubt made the statement supporting the case of the prosecution, but when asked in the cross examination, he has avoided to explain anything about the injuries sustained by the accused mentioning that he did not see the blood coming out of the head of the accused. At this stage it may be mentioned that the appellant immediately after being arrested at once pointed out the three injuries he had sustained. He was therefore sent to the Medical Officer for necessary treatment. Dr.Ashok Dhirubhai (Exhibit 32) examined the appellant with regards to the prohibition case as it was alleged that he had consumed liquor. At the same time he was also examined and treated for the injuries he has sustained. Dr. Ashok Dhirubhai has supported the case of the appellant stating that when he examined the appellant, he found four injuries on his person. There was one wound on the occipital region; another was on the right parietal region, one abrasion on the right side iliac spine and pain & tenderness on the left side back near scapular region. No doubt, doctor has with regards to the first two injuries made a statement that both the injuries were old one, but, we do not agree with his such opinion. The doctor has, when asked made it clear that injuries must have been caused within 18 to 20 hours prior to his examination, and considering that aspect he has thus opined about the injuries. It may be stated that the incident happened on 5th September, 1991 at about 8.00 p.m. The doctor examined the appellant on 6th September, 1991 at 6.30 p.m. It therefore follows that the injuries found on the person of the appellant must have been caused during the occurrence as the same fits in well with the time format. About two of the injuries though visible, this witness and others do not explain and have shrewdly eschewed to explain saying that they did not see how the injuries were caused. When this witness thus suppresses the fact, his evidence must be viewed with suspicion, his evidence cannot be termed independent and trustworthy.

8. Ghusabhai Shefabhai (Exhibit 17) is also examined. He has in the examination-in-chief made the statements supporting the prosecution case. When he was passing by the S.T. bus stand, he heard uproar and also heard the words `beat, beat' (maro, maro). Thereafter, he tried to improve the same saying that instead of the word beat, beat, he heard `run, run' (Dodo Dodo),

realizing the damaging effect of his earlier statement. His conduct of changing the statement in the next breath leads us to believe that by changing statement he wanted to camouflage the truth divulged. It may be stated that Damjibhai Jadavbhai had not alone gone to reprimand the appellant, along with him there were about 14 persons. Against that group of 14 persons, appellant and Ganeshbhai were there. It can well be said that the words `beat' `beat' must be from the group of 14 to 15 persons because they wanted to take revenge as Damjibhai was injured by the appellant about half an hour back. The words `beat' `beat' also show that there must be an assault from the complainant's party. In order to suppress the wrong, they did, assaulting the appellant and his crony, the witness accordingly made the statements. When that is the case, the evidence of this witness also cannot be termed independent and reliable.

9. Ramanbhai Kodarbhai, the Investigating Officer, in his evidence (Exhibit 43) has admitted that when the appellant was arrested, he found the injuries on his person. He has also admitted that the appellant lodged the complaint against the concerned for causing him the injury which is not investigated into for the reason best known to the prosecution. A panchanama at the time of arresting the appellant was drawn which is produced at Exhibit 22. It supports the nature of injury found on the person of the appellant. When a further statement under Section 313 of the Criminal Procedure Code was recorded by the lower court, the appellant filed his written statement at Exhibit 51, wherein he has made it categorically clear that he was beaten by a group of persons, he sustained the injuries, and the assailants were the deceased, Harjibhai and others, but the police did not investigate about his complaint. The Police Officer has thereby avoided to know other side of the coin. Thus, the evidence on record cannot be said to be independent, clear, cogent, credible, reliable and it suffers from vice of unreasonableness. When that is so as held in the case of Lakshmi Singh (supra), the three inferences would come into play. Firstly it can be said that by not explaining the injuries on the person of the accused, the prosecution has suppressed the genesis and the origin of the occurrence, and has thus not presented the true version. Secondly, the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable; and thirdly the defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case. In view of the fact the

prosecution cannot succeed; and the appellant is entitled to an acquittal on the ground of non-explanation of the injuries, but it is with regards to the finding under Section 302 of the I.P.C. and 324 of the IPC.

10. We would now switch over to the next point, namely, self defence. As observed by the Apex Court in the case of MUKUNDE SINGH v. STATE OF U.P., (1994) 2 SCC 191 the court has to consider the merits and demerits of the evidence on record about the plea of self-defence and must also examine whether the right of self-defence has been exceeded. We may in short mention how and to what extent the law permits exercise of the right of private defence.

11. When a person is facing imminent danger or threat to his personal property or has reason to believe about the same, he has a right, which is defensive and not punitive or retributive, to use counter force to the extent necessary, but of course not to be weighed with golden scales, for protecting himself or the property and thereby he can ward off the danger of being attacked or put the threat or danger to rout. The exercise of the right is co-extensive with present and imminent danger threat, attack or force. Soon the danger, threat or attack, is ward off or disappeared or destroyed the exercise of right also comes to an end. When there is a time to have recourse to the protection of police or public authority the right does not accrue and cannot be availed of. The burden to prove initially is on the accused but the standard of proof is not that much rigorous as it lies on the prosecution to establish the charge beyond reasonable doubt. If the accused himself taking the weapon, goes to the victim and assaults, he cannot take the advantge of the right of self-defence because in that case it would amount to his design.

12. It is alleged by the prosecution that after Damjibhai Madhabhai reaching home complained against the appellant & his crony, his father and others, (a group of about 14 persons) went to the Bus stop to scold the appellant. If at all Madhabhai Jadavbhai was to berate the appellant, a group of 14 persons was not at all necessary. However, when with large numbers of persons he goes, it is a circumstance going to show that with some design all had gone there. It was submitted that all had gone there without any weapon or instrument and so bona fides might not be doubted. Let us state that the investigating officer while arresting the appellant found injuries on his person, and he sent the appellant to the hospital for treatment. As discussed earlier Dr.

Ashok Dhirubhai also found above stated injuries on the person of the accused. When all these injuries were found and as stated above, those injuries were possible during the period of occurrence of the incident in question, it can well be said that Madhabhai Jadavbhai and others had gone armed with some weapons namely sticks about which the appellant says that the said group attacked on him and during attack caused the injuries. The defence is thus probable. When aforesaid 4 injuries were caused, two of them being on head - the vital part, one would naturally like to save himself using counter force in the exercise of a right of private defence. As held in the case of JAI DEV v. STATE OF PUBJAB,1963 SC 612, the person assaulted or facing an apprehension of an assault is not supposed to run away or being coward succumb to the threat or attack and suffer injury or death. As soon as the cause for the reasonable apprehension has disappeared and the threat has either been destroyed or has been put to rout, there can be no occasion to exercise the right of private defence. In the exercise of that right, he must use necessary force and must stop using the force as soon as the threat has disappeared. Here, when he was attacked first and four injuries were caused, two of them being serious, he had right to defend himself by counter blows. He, therefore, gave one knife blow on the person of Madhabhai Jadavbhai on the chest. To save himself, he has caused only one injury to Harjibhai Yadavbhai against four injuries on his person. The injuries found on the person of Harjibhai Jadavbhai is of trivial nature. No one in the group of 14 persons sustained injuries at that time. From this fact, we are inclined to hold that the appellant was justified in exercising his right of private defence and he used necessary force and has not at all exceeded his right of private defence. He has not used the force after the danger was destroyed. It may be stated that he had no time to seek protection of the police. When that is so, he is entitled to acquittal qua the charge under Section 302 and 324 of the I.P.C. It seems that the learned Judge has lost the sight of the above stated two grounds which were also raised before him and he fell into error in negativing the same and appreciating the evidence on record. He has it seems misdirected himself.

13. On that day under Section 37 of the Bombay Police Act, the Notification issued by the District Magistrate of Bhavnagar was in force which is produced at Exhibit-40. The appellant on that day was armed with a knife and that can be spelt out from the defence he has taken. Not to hold the knife was the fiat of the

District Magistrate. Still, however, the appellant held the same and committed the breach of that Notification. He has been therefore, rightly convicted under Section 135 of the Police Act. Considering the cogent evidence on record in this regard, we see no reason to upset the finding of the learned Judge that the charge of the offence under Section 135 of the Bombay Police Act has been established beyond reasonable doubt. Likewise, we see no justification to interfere with the conviction and sentence of the offence under Section 66(1) and (b) and 85(1) and (3) of the Bombay Prohibition Act. Dr. Ashok Dhirubhai who examined the appellant found that the appellant's breath was smelling of alcohol, his gait was unsteady, his speech was incoherent and his pupils were dilated. Such symptoms according to him were indicative of consumption of alcohol. The blood was also extracted from his body and was sent to chemical analyser. As per the C.A. report (Exh. 37) the accused's blood contained 0.0583 per cent w/v of Ethyl Alcohol. The evidence discussed above also shows that the appellant was found from the public place in drunken condition. The police officer also found that appellant was having no pass or permit to consume the alcohol. When the prosecution has thus led sufficient and reliable evidence, we accept the same and hold that the learned judge has rightly convicted the appellant of the offence under Section 66(1)(b) and Section 85(1)(3) of the Bombay Prohibition Act.

14. For the foregoing reasons, the appeal is required to be partly allowed. Accordingly, the appeal is partly allowed. The conviction and sentence inflicted by the lower court with regards to the offence under Section 302 and 324 of the I.P.C. are hereby quashed and set aside and the appellant is acquitted thereof. But, the conviction under Section 135 of the Bombay Police Act and Section 66(1)(b) and 85(1)(1)(3) of the Bombay Prohibition Act is maintained, and the appellant is sentenced to simple imprisonment of six months and a fine of Rs. 500/- (Rupees five hundred only), in default, simple imprisonment of one month more for the offence under Section 66(1)(b) of the Bombay Prohibition Act. No separate sentence of the offence under Sec.85(1)(1)(3) of the Bombay Prohibition Act, and Section 135 of the Bombay Police Act is inflicted. The appellant is in jail since 15.9.1992. The sentence we have inflicted has already been undergone by now. The appellant therefore be set at liberty forthwith if no longer required in any other case.
